UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.696
6 April 2001

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD OF THE 696th MEETING

Held at Headquarters, New York,
on Monday, 26 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

CONTENTS

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of this meeting and of other meetings will be issued in a corrigendum.

00-50164 (E)

The meeting was called to order at 10.05 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4; A/CN.9/XXXIII/CRP.2 and Add.1-2)

1. The CHAIRMAN recalled that at the previous meeting the Commission had taken up the issues of whether to refer the draft Convention back to the Working Group, and whether to recommend to the General Assembly that the draft Convention should be adopted at a diplomatic conference, or by the Assembly itself. The Commission had now received the rest of the report of the drafting group (A/CN.9/XXXIII/CRP.2 and Add.1-2), which it would need to consider.

2. Mr. BURMAN (United States of America) said his delegation recommended that the Commission should continue its efforts to resolve outstanding issues in relation to the draft Convention before taking up the drafting group's report.

3. Mr. ATWOOD (Australia) said it was disappointing that the Commission had been unable to complete its consideration of the draft Convention. If the draft text was referred back to the Working Group, the task of that Group should be clearly defined. As to the question of whether the draft Convention should be adopted by the General Assembly or at a diplomatic conference, his delegation believed that the Commission should make an open-ended recommendation to the General Assembly, leaving open the possibility of the draft Convention being adopted by either process.

4. Ms. MANGKLATANAKUL (Thailand) said that her delegation was in favour of referring the draft Convention to the Working Group. Many new issues had been raised which needed to be re-evaluated. Her delegation hoped that the draft Convention would be adopted at a diplomatic conference, depending on the financial possibilities.

5. Ms. McMILLAN (United Kingdom) said that her delegation associated itself with the two previous speakers. The Working Group's task and terms of reference must be clearly defined.

6. Mr. PANG (Singapore) said his delegation felt that any further consideration of the draft Convention should be carried out by the Commission, since the Working Group had already completed its work. Sending back the draft Convention to the Working Group would enable the latter to reopen issues which had already been settled, no matter what its terms of reference. Moreover, the Commission's resources would be put to better use if it considered the draft Convention directly.

7. Mr. BURMAN (United States of America) said that there seemed to be considerable support for sending the draft Convention back to the Working Group. The Working Group had not actually completed its consideration of the text, and a number of issues had been left unresolved. There would be an understanding that issues which had already been resolved would not be reopened. His delegation supported the idea that the Commission should send a draft resolution to the Sixth Committee on the adoption of the draft Convention either by the General Assembly, in 2001, or, if a host country had been secured and there were

assurances that the costs would be contained within existing budgetary resources, at a diplomatic conference.

8. Mr. HERRMANN (Secretary of the Commission) said that if the draft Convention was adopted at a diplomatic conference, it was unlikely that the host State would cover all the costs; the tradition had been that the host State would pay the difference arising from the fact that the conference was not taking place at the location of the substantive secretariat. It was difficult to make an estimate of the costs, which would depend partly on the extent to which modern technologies could be used. The Commission should draw up a draft resolution so that that internal process could be started and the possibility of holding a diplomatic conference could be taken into account when the next programme budget was drawn up.

9. Ms. STRAGANZ (Austria) said that her delegation was in favour of referring the draft Convention to the Working Group, and of formulating an open-ended draft resolution on the adoption of the draft Convention.

10. Mr. MOHAMED (Nigeria) said that his delegation would prefer the draft Convention to be finalized in the Commission, rather than the Working Group. It was premature to take up the question of a diplomatic conference, before completing work on the draft Convention.

11. Mr. HERRMANN (Secretary of the Commission) said that the Working Group could meet in December 2000. However, if the Commission wished to continue its consideration of the draft Convention it would have to do so in January 2001, since it had exhausted its entitlements for 2000.

12. Mr. GHAZIZADEH (Islamic Republic of Iran) said that his delegation was in favour of sending the draft Convention back to the Working Group, so as to avoid delays in finalizing the draft Convention. His delegation supported the idea of holding a diplomatic conference for the adoption of the draft Convention.

13. Ms. GAVRILESCU (Romania) said that her delegation could go along with any decision which was supported by the majority of members of the Commission. However, it would be preferable not to send the draft Convention back to the Working Group, because the latter had referred some unresolved issues to the Commission, which had not yet resolved them. She also had reservations about making a recommendation about the adoption of the draft Convention because the text had not been finalized.

14. Mr. DOYLE (Observer for Ireland) said that the Working Group, although it had done all it could, had clearly not completed its work; if it had, the Commission would not have spent two weeks discussing the scope of the draft Convention. Much remained to be done. Indeed, another session might not suffice for the Commission to finalize a text. He was therefore in favour of referring the matter to the Working Group, obviously with strict terms of reference. He saw no insuperable difficulty in circulating the Working Group's report. On the question of a diplomatic conference he urged flexibility.

15. Mr. MARADIAGA (Honduras) said that ideally the Working Group should reconsider the draft text and return it to the Commission. Progress had been so

slow, however, that his preference would be to allow the Secretariat to make the decision, on the basis of circumstances as they unfolded. The option of holding extra meetings was impracticable, owing to the shortage of resources.

16. Mr. MORÁN BOVIO (Spain) said he was in favour of returning the draft text to the Working Group: the impact of the Commission's deliberations had been such that the whole conformation of the draft Convention had changed. He trusted that at its next session the Commission would be able to review the Working Group's work faster than at the current session.

17. Mr. TELL (France) said that, given the shortage of available time and the fact that the Commission would in any case have to scrutinize any draft text, it would be better for the Commission to assume the work itself. Moreover, discussion of article 18 onwards, on which substantive decisions would need to be taken, would inevitably lead the Working Group to reopen issues that had already been settled.

18. Mr. Al-NASSER (Observer for Saudi Arabia) favoured returning the text to the Working Group, many of whose members also participated in the Commission. The Working Group could submit a text in which all the problems raised during the current session could be resolved.

19. Mr. RENGER (Germany) concurred with the view of the representative of the United Kingdom that if the draft text was to be returned to the Working Group - to which he had no objection - clear terms of reference must be laid out. Future action should be dictated by circumstances. As for adoption, the Commission might benefit from the discipline imposed by a timetable: a final text might be ready for adoption under a General Assembly resolution by 2001, whereas practical considerations suggested that a diplomatic conference could not be convened before 2002.

20. Ms. SABO (Observer for Canada) said that, following informal consultations with others, her delegation was firmly persuaded that the text would be best finalized by the Working Group. Some of the hardest decisions had already been taken and little time was available, since there was much else of importance to discuss. The Working Group would also produce a coherent text on which States could make comments.

21. Mr. IKEDA (Japan) said that the majority was clearly in favour of returning the draft text to the Working Group. As a member of the Group, he believed it capable of solving the outstanding problems and submitting a complete draft text to the Commission.

The meeting was suspended at 11.20 a.m. and resumed at 11.50 a.m.

Title of the draft Convention

22. The CHAIRMAN invited the Commission to resume consideration of the report of the drafting group (A/CN.9/XXXIII/CRP.2) and, in particular, to take a decision on the title of the draft Convention .

23. Mr. WINSHIP (United States of America) said that his delegation would have preferred the title "Draft Convention on the Assignment of Receivables"; however, there appeared to be a clear consensus in favour of "Draft Convention on Assignment of Receivables in International Trade".

24. Mr. MORÁN BOVIO (Spain), Mr. MARADIAGA (Honduras) and Mr. RENGER (Germany) said that their delegations joined that consensus.

25. Mr. MARKUS (Observer for Switzerland) said that he would prefer the title "Draft Convention on the Assignment of Receivables" since the inclusion of a reference to international trade might restrict the scope of the instrument, which covered not only trade, but also financial, receivables. However, he was prepared to join the emerging consensus.

26. Mr. LAMBERTZ (Observer for Sweden) said that he associated himself with the views expressed by the observer for Switzerland.

27. Mr. MORÁN BOVIO (Spain) pointed out that since the titles of the Commission's instruments almost always included a reference to international trade, those words should in no way be taken as limiting the scope of the draft Convention.

28. Mr. TELL (France) said that he would prefer to mention international trade in the title in order to make it clear that the draft Convention was not intended to cover the assignment of receivables at the domestic level.

29. Mr. IKEDA (Japan) said that he agreed with the representative of France.

30. Mr. MARADIAGA (Honduras) said that if a shorter title was desired, the instrument might be called "Draft Convention on International Assignment of Receivables".

31. Mr. MOHAMED (Nigeria) supported the inclusion of the words "international trade"; the concerns raised by the observers for Switzerland and Sweden could be addressed in the commentary.

32. The CHAIRMAN said that if he heard no objection, he would take it that the Commission had reached consensus on the title "Draft Convention on Assignment of Receivables in International Trade".

33. It was so decided.

Preamble (A/CN.9/470)

34. The CHAIRMAN invited the Commission to take a decision on the bracketed text contained in the preamble to the draft Convention (A/CN.9/470).

35. Mr. MORÁN BOVIO (Spain) said that in several cases, the question of which bracketed option to retain could be assumed to have been resolved by the Commission's decision on the title of the draft Convention.

36. Mr. RENGER (Germany) said that he would prefer to delete the bracketed words "that", "the" and "constitute an obstacle to financing transactions" from the second preambular paragraph.

37. Mr. IKEDA (Japan) said that his delegation was in favour of retaining the reference to financing transactions, the promotion of which was the primary objective of the draft Convention.

38. Mr. TELL (France) said he agreed that the instrument's purpose would be lost if the words "constitute an obstacle to financing transactions" were deleted; it must be clear that the draft Convention was intended to facilitate receivables financing rather than simply resolving conflicts between different national legal systems. He would therefore prefer to retain all the words currently placed in brackets in the second preambular paragraph.

39. Mr. MORÁN BOVIO (Spain) suggested that the Commission should adopt the German proposal to delete all the bracketed material in that paragraph except the words "of receivables" and to address those issues in the commentary. However, he was prepared to defer to the majority view.

40. Ms. SABO (Observer for Canada) said that the Working Group had discussed the matter at length. Her preference would be to delete all the material contained in brackets in the second preambular paragraph; however, as a compromise, she proposed that the bracketed text should be retained and the words "in international trade" deleted.

41. The CHAIRMAN pointed out that the Canadian proposal did not address the question of whether the Commission wished to include an explicit reference to financing.

42. Mr. PINZÓN SÁNCHEZ (Colombia) said that since the Commission had decided not to mention receivables financing in the title of the draft Convention, it might be best to delete the second preambular paragraph and to consider whether the subject of financing should be covered in the third and fifth preambular paragraphs.

43. Mr. WINSHIP (United States of America) said that his delegation associated itself with the statements made by the representatives of Japan and France and supported the amendment proposed by the observer for Canada. The fact that the problems mentioned in the first line of the paragraph constituted an obstacle to financing transactions was one of the chief reasons for the need to adopt the uniform rules referred to in the fifth preambular paragraph.

44. Moreover, the decision to refer to the preamble in article 7 (1) gave it an importance that should be explicit in the text of the draft Convention, particularly as the form and status of the commentary had yet to be determined.

45. Mr. DOYLE (Observer for Ireland) said he agreed that the preamble was more important than might first appear and that he would prefer to retain the bracketed text in the second preambular paragraph: however, he had no strong feelings on the matter.

46. Ms. McMILLAN (United Kingdom) said she would not wish to lose the paragraph as a whole, as it expressed part of the reason for the Convention. Her delegation supported retention of the paragraph, as reworded by Canada.

47. Mr. MARADIAGA (Honduras) suggested that the Secretariat should take care of some of the drafting. As the Commission had decided to use the wording "assignment of receivables in international trade" in the title of the Convention, the bracketed expressions in the preamble referring to "financing" were no longer required.

48. Mr. RENGER (Germany), Mr. MORÁN BOVIO (Spain) and Ms. STRAGANZ (Austria) said they supported the new wording.

49. The CHAIRMAN said he took it that the second preambular paragraph would be reworded as suggested by the Canadian delegation.

50. Mr. WINSHIP (United States of America) suggested that the words "receivables financing" and "financing" should be deleted in the third preambular paragraph. However the clause beginning "including but not limited to ..." should be retained in order to alert the reader as to the types of transactions covered by the draft Convention. The list might not be complete, but the illustrations given stressed the importance of the text and the wide variety of transactions.

51. Mr. MORÁN BOVIO (Spain) and Mr. TELL (France) said they shared the views expressed by the United States delegation.

52. Mr. TELL (France) noted that, in view of the change in article 11 made the previous week, the text did not in fact protect "existing assignment practices".

53. Ms. WALSH (Observer for Canada) agreed with the proposal to delete the reference to "receivables financing" and "financing" in the third paragraph. However, she was concerned that the illustrative list did not refer to the very important use of assignment transactions in providing collateral for loan financing. Also, the list could be under-inclusive, become dated over time and give rise to unnecessary interpretation difficulties. It would be simpler to delete the list rather than to discuss what should be included.

54. Ms. GAVRILESCU (Romania) said she shared the views expressed by the United States delegation but also agreed with the concerns of the Canadian delegation. Perhaps there could be a compromise solution, as the list did not exclude other possibilities.

55. Mr. DOYLE (Observer for Ireland) said he shared the concerns of the Canadian delegation and was also in favour of deleting the list.

56. Ms. McMILLAN (United Kingdom) said she was also in favour of deleting the list. There was already a list of exclusions in article 4, as well as the list of inclusions in articles 11 and 12. The difficulty of having an additional list in the preamble was that it might seem to conflict with the later text.

57. The CHAIRMAN noted that the United States delegation had mentioned on a previous occasion that inclusion of the list would give a signal to those industries to which it referred.

58. Mr. RENGER (Germany) agreed with the views expressed by the United Kingdom delegation. Also, he doubted whether the industries referred to would actually read the preamble.

59. The CHAIRMAN said he took it that the Commission accepted the paragraph, with the deletion of the list and the deletions suggested by the United States delegation.

60. Mr. BURMAN (United States of America) said he recognized the concerns expressed. He suggested that the issue should be highlighted in the commentary, subject to the Commission's determination of the term and status of the commentary. Those who had not had the benefit of attending the working groups would then have the opportunity to see what kind of subjects were relevant, subject to the comments and observations made in relation to articles 4, 11 and 12.

61. Ms. McMILLAN (United Kingdom), referring to the fourth preambular paragraph, suggested that when the Working Group reconvened it should consider inserting an additional paragraph to highlight the fact that, while adequate protection for the interests of the debtor should be secured, national law would be preserved in important areas such as preferential creditors and the national system of land registration which governed priority.

62. The CHAIRMAN noted that the Commission was aiming to complete the preamble at the present session. The Working Group's time could be used optimally in relation to those provisions that it had not yet considered.

63. Ms. GAVRILESCU (Romania) associated herself with the views expressed by the delegate of the United Kingdom. She would not object to the present text of the fourth preambular paragraph, but she supported the proposed addition.

64. Mr. WINSHIP (United States of America) said that the terms of reference for the Working Group should all be decided at the same time. If they were to accept the United Kingdom proposal, additional concerns might also be added to the preamble during the consideration of the draft text, and the preamble would become unnecessarily long. He preferred to retain the present wording of the fourth preambular paragraph.

65. Mr. DOYLE (Observer for Ireland) agreed with the previous speaker. He appreciated the merits of the United Kingdom proposal, but the aim of the present debate was to finalize the preamble. The Commission should not consider any additional proposals.

66. Mr. MORÁN BOVIO (Spain) said that the purpose of the present exercise was to decide whether to retain or delete the sections of the text marked by square brackets. His delegation had difficulty with the United Kingdom suggestion because international trade law was not intended to reduce or diminish national

law, nor to attack established legal practices for dealing with real estate issues.

67. Mr. HERRMANN (Secretary of UNCITRAL) pointed out that the concern to preserve national law had been highlighted several times in the guide to enactment of the recently adopted Model Law on Cross-Border Insolvency, although the preamble to that text did not refer to the issue. It would be consistent to proceed along similar lines.

68. The CHAIRMAN said that the fourth preambular paragraph would remain as it was.

69. Mr. RENGER (Germany), referring to the fifth preambular paragraph, suggested that the words "in", "financing" and "capital and", which were in square brackets in the text, should be deleted.

70. Ms. WALSH (Observer for Canada) said she agreed with the previous speaker but would prefer to retain the words "capital and", which would allow the text to more accurately reflect the dual use of assignment of receivables in the context of the draft Convention, both in the sale or transfer of the receivables and in their use as collateral in a secured credit transaction. The reference to "credit" alone would not capture the full breadth of the draft Convention.

71. Mr. MORÁN BOVIO (Spain), Ms. STRAGANZ (Austria) and Mr. WINSHIP (United States of America) supported the Canadian proposal.

72. Mr. BERNER (Association of the City Bar of New York), in the absence of his colleagues from EUROPAFACTORING and Factors Chain International, endorsed the Canadian proposal.

73. Mr. MOHAMED (Nigeria) said that the reference to promoting the availability of capital and credit should precede the reference to the development of international trade.

74. Mr. TELL (France) supported the Nigerian proposal to reverse the two clauses in the fifth preambular paragraph. Promotion of the availability of capital and credit would by definition help to facilitate the development of international trade. It was more logical to move from a particular to a general reference.

75. Ms. McMILLAN (United Kingdom) said that the preamble was important and should refer to the most significant points of the draft Convention. She therefore supported the Nigerian proposal.

76. Mr. MORÁN BOVIO (Spain) and Ms. SABO (Observer for Canada) also supported the Nigerian proposal.

77. Mr. Al-NASSER (Observer for Saudi Arabia) supported the wording proposed by the Nigerian and Canadian delegations.

78. The CHAIRMAN said he took it that the Commission accepted the Nigerian proposal. The Secretariat would redraft the paragraph.

The meeting rose at 1 p.m.

UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.697
6 April 2001

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD OF THE 697th MEETING

Held at Headquarters, New York,
on Monday, 26 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

CONTENTS

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

ELECTION OF OFFICERS (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of this meeting and of other meetings will be issued in a corrigendum.

00-50182 (E)

The meeting was called to order at 3.05 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4; A/CN.9/XXXIII/CRP.2 and Add.1 and 2)

1. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) pointed out that the reference to "receivables financing" in the title and preamble to the draft Convention had now been deleted. Accordingly, draft article 6 (c), which contained a definition of receivables financing and which had been left in square brackets, could now be deleted.

2. Mr. MORÁN BOVIO (Spain) and Mr. KOBORI (Japan) supported that suggestion.

3. The CHAIRMAN said that, in the absence of objection, he would take it that draft article 6 (c) should be deleted.

4. It was so decided.

Report of the Drafting Group (continued) (A/CN.9/XXXIII/CRP.2 and Add.1 and 2)

5. The CHAIRMAN invited the Commission to adopt draft articles 1 to 17, as contained in the report of the Drafting Group, with the exception of the language in square brackets.

Draft article 1 (A/CN.9/XXXIII/CRP.2)

6. Paragraphs (1) (2) and (3) of draft article 1 were adopted.

7. The CHAIRMAN said that a decision on paragraph (4) should be deferred, since it referred to a question not yet resolved by the Commission.

8. Mr. RENGER (Germany) said that paragraph (5) could only be finally approved once the annex to the draft Convention had been adopted, since the Commission had not yet discussed the connection between the annex and draft article 40.

Draft article 2 (A/CN.9/XXXIII/CRP.2)

9. Mr. TELL (France) said that the wording of draft article 2 referred only to the assignment of contractual receivables and did not make provision for non-contractual receivables. That was a serious shortcoming and might deter States in which transactions in non-contractual receivables were widespread from ratifying the future Convention. His delegation intended to consult with financial circles on the matter, with a view to making a declaration at the appropriate time that would provide for an "opt-in" arrangement for such practices.

10. The CHAIRMAN asked whether the representative of France wished the adoption of that article to be deferred.

11. Mr. TELL (France) said in clarification that he was suggesting another solution, namely, a declaration whereby provision could be made for the

assignment of non-contractual receivables in those States wishing to enable their economic operators to benefit from such transactions. He thought it unlikely that other States would object to such a solution.

12. Draft article 2 was adopted.

Draft article 3 (A/CN.9/XXXIII/CRP.2)

13. Draft article 3 was adopted.

Draft article 4 (A/CN.9/XXXIII/CRP.2 and Add.1 and 2)

14. Mr. WINSHIP (United States of America) said that the Drafting Group had agreed to delete the words "To the extent" in paragraph (1) (b). The text would then read: "Made by the delivery of a negotiable instrument, with an endorsement, if necessary;".

15. Mr. RENGER (Germany) said that the language of paragraph (3) (a), stating that the Convention did not "affect the question whether", was too colloquial for a legal instrument and was therefore unsatisfactory.

16. Ms. MCMILLAN (United Kingdom) said that the Commission had intended, in paragraph (3) (a), to state that the application of the future Convention to assignment of a receivable would not affect a right to real estate. It was important to make clear, in the new wording, that the draft Convention did not seek to change substantive law in respect of land or real estate. She hoped that the Secretariat would be able to reformulate the subparagraph in that light.

17. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that paragraph (3) (a) should be understood in the opposite sense: a right in real estate did not affect a right in a receivable related to it. Depending on the wishes of the Commission, subparagraphs (a) and (b) could be merged in order to state that the Convention would not affect priority rights to receivables in a conflict between holders of rights to real estate.

18. The CHAIRMAN said that the intention underlying subparagraph (a) was to establish the principle on which the rule in subparagraph (b) was based.

19. Ms. GAVRILESCU (Romania) said that a proper distinction must be drawn between priority rights and property rights in real estate, which were quite different things. Also, the word "or" in subparagraph (b) should be deleted.

20. Mr. WINSHIP (United States of America) said he could agree to the deletion of the word "or" in subparagraph (b). With regard to the question addressed by the representative of the United Kingdom, he supported the suggestion by the Secretary of the Working Group that subparagraphs (a) and (b) of paragraph (3) should be combined, to make clear that the priority rules concerning a right in real estate, if there was such a right, would be determined by law other than the Convention.

21. Mr. DOYLE (Observer for Ireland) shared the doubts of the United Kingdom representative concerning the language of subparagraph (a). He supported the suggestion of combining subparagraphs (a) and (b).

22. Mr. TELL (France) said that subparagraphs (a) and (b) of paragraph (3) were indissolubly linked, the second being dependent on fulfilment of the condition in the first. Subparagraph (b) should be clarified; he suggested amending "the right of an assignee of the receivable" to read "the right of an assignee to that receivable". He agreed with the representative of Romania that the subject-matter of subparagraphs (b) and (c) should be clearly distinguished. However, it was not necessary to delete the word "or", which was merely a stylistic device, although that could be done if subparagraphs (a) and (b) were combined. In the French version of paragraphs 2 (d) and 2 (f) "investment securities" should have been translated as "valeurs mobilières", not as "titres de placement".

23. Mr. Al-SAIDI (Observer for Kuwait) asked whether draft article 4 would be reviewed by the Working Group. Paragraph (2) (a) contained an exclusion for receivables arising from transactions on a regulated exchange; he did not recall any discussion of that provision by the Commission.

24. Mr. MORÁN BOVIO (Spain) welcomed the proposal to combine subparagraphs (a) and (b) of paragraph 3, which would help to clarify its meaning.

25. Ms. WALSH (Observer for Canada), supported by Mr. MORÁN BOVIO (Spain), suggested that, since the current wording of subparagraphs (a) and (b) of paragraph (3) was sufficiently clear, they should be combined by adding the word "and" at the end of subparagraph (a) and deleting the initial word "Affect" in subparagraph (b). The word "or" at the end of former subparagraph (b) should probably remain.

26. Ms. GAVRILESCU (Romania) said that, if the various parts of the provision were clear, there was no need for such linking words as "or", which could create uncertainty. If the Commission insisted on some sort of link, however, her delegation preferred the conjunction "and".

27. Mr. MOHAMED (Nigeria) said that subparagraph (a) was not well drafted, but he could agree to combining it with subparagraph (b). For the sake of logic, it would be better to start paragraph (3) with subparagraph (c).

28. The CHAIRMAN said that the Commission was clearly in favour of combining subparagraphs (a) and (b) of paragraph (3), and there was some support for the deletion of "or".

29. After a procedural discussion in which Mr. MORÁN BOVIO (Spain), Mr. RENGER (Germany), Mr. BURMAN (United States of America) and the CHAIRMAN took part, Ms. WALSH (Observer for Canada) suggested that some delegations should consult informally and return with a text.

30. The CHAIRMAN said that, in the absence of objection to that suggestion, further consideration of draft article 4 would be deferred for the time being.

Draft articles 5, 6 and 7 (A/CN.9/XXXIII/CRP.2)

31. The CHAIRMAN recalled that it had been decided to delete subparagraph (c) of draft article 5.

32. Draft articles 5, 6 and 7 were adopted.

Draft articles 8, 9 and 10 (A/CN.9/XXXIII/CRP.2/Add.1)

33. Draft articles 8, 9 and 10 were adopted.

Draft article 11 (A/CN.9/XXXIII/CRP.2/Add.1 and Add.2)

34. Mr. TELL (France), referring to the revised version of article 11 (3) (a) as it appeared in document A/CN.9/XXXIII/CRP.2/Add.2, which dealt, inter alia, with receivables arising under an original contract for the supply or lease of goods, said that the English term "goods" had in the French version been translated in a drastically restricted manner as "bien meubles corporels", (tangible assets). His delegation did not see why intangible assets (bien meubles incorporels) should have been excluded from the scope of the draft article, especially when they were far more important to businesses in the modern economy than mere merchandise. The misunderstanding stemmed from an original United States proposal regarding article 11 (3) (a) that had been very restrictive. He was not suggesting that the debate in the Commission should be reopened; but he did believe the matter needed to be referred to the Working Group.

35. Ms. WALSH (Observer for Canada) said that it was only in the Drafting Group that the policy difference had come out. With some reluctance, her delegation suggested placing the English and French terms in square brackets, so that the Working Group could discuss the question fully and make its proposal at the next session.

36. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) confirmed that the issue had been discussed in the Drafting Group, where it had been agreed that the term "goods" was always to mean movable, tangible goods. That instruction had been given also to the language revisers. The Commission, had never discussed the matter of intangible assets, however, and consequently had not given the Drafting Group a policy decision to implement in the matter.

37. Mr. DOYLE (Observer for Ireland) said that there were indeed issues of substance involved and the Working Group might have to take the matter up.

38. Mr. BURMAN (United States of America) said that the decision described by the Secretary had been taken in the Working Group after an extended discussion in which concerns had been fully expressed about the inclusion of intangible goods. His delegation believed that the text should stand but would not oppose its being taken up again by the Working Group.

39. The CHAIRMAN recalled that there was a clear decision of the Commission that the Working Group was not to reopen any matters that had been settled.

40. Mr. MORÁN BOVIO (Spain) said that he reluctantly favoured putting the terms in square brackets and asking the Drafting Group to work further on the text.

41. Mr. TELL (France) said that the Commission itself had never discussed the term in question nor taken a policy decision as to whether its scope was restricted to tangible assets. To his delegation it was obvious that the term covered intangible assets. The Working Group must work on the question.

42. The CHAIRMAN said he took it that the Commission wished to put the terms "goods" and "corporels" in square brackets for further discussion and to adopt draft article 11 with the exception of the bracketed language.

43. It was so decided.

44. Draft article 11 was adopted.

Draft article 12 (A/CN.9/XXXIII/CRP.2/Add.1 and Add.2)

45. The CHAIRMAN said he took it that, in keeping with the decision just taken on draft article 11 (3) (a), the Commission wished to put in square brackets the terms "goods" and "incorporels" in the English and French versions of article 12 (4) (a).

46. It was so decided.

47. Mr. DESCHAMPS (Observer for Canada) said that the French text of article 12 (5) differed from the English text and that he would be suggesting changes.

48. Draft article 12 was adopted.

Draft articles 13 to 17 (A/CN.9/XXXIII/CRP.2/Add.2)

49. The CHAIRMAN noted that the term "receivables financing" in article 13 (3) was no longer in square brackets.

50. Draft articles 13, 14, 15, 16 and 17 were adopted.

The meeting was suspended at 4.35 p.m. and resumed at 5 p.m.

51. The CHAIRMAN recalled that article 12 had been adopted subject to drafting changes in paragraph (5) of the French text (A/CN.9/XXXIII/CRP.2/Add.1) to bring it into line with the English.

52. Mr. DESCHAMPS (Observer for Canada), speaking on behalf of the francophone delegations, proposed that paragraph (5) of the French text should read:

> "Le transfert visé au paragraphe 1 du présent article d'une sûreté comportant des possessions n'a pas d'incidences sur les obligations du cédant envers le débiteur ou la personne qui accorde la sûreté relative au bien transféré en vertu de la loi régissant cette sûreté.".

53. It was so decided.

Draft article 4 (continued) (A/C.9/XXXIII/CRP.2 and Add.1 and 2)

54. The CHAIRMAN recalled that, in the light of the strong support for combining paragraphs 3 (a) and (b) of draft article 4 as they appeared in document A/CN.9/XXXIII/CRP.2/Add.2 and the proposal for the deletion of the conjunction "or", the Commission had decided that the English-speaking delegations should consult informally with a view to producing a text that incorporated those changes.

55. Mr. WINSHIP (United States of America), speaking also on behalf of the Canadian and German delegations, said that they had agreed on the following text:

> "(a) Affect whether a property right in real estate confers a right in a receivable related to that real estate, and does not determine the priority of such a right in the receivable with respect to the competing right of an assignee of the receivable;".

56. The conjunction "or" following the semi-colon and preceding paragraph (c) should be deleted.

57. Ms. GAVRILESCU (Romania) said that her delegation fully supported the United States proposal.

58. Ms. Li Ling (China) said that it was not clear to her delegation why the verb "determine" had been substituted for "affect". She questioned the repetition of the words "does not", since they already appeared in the chapeau.

59. Mr. BURMAN (United States of America) said it had been felt that the words "affect" and "determine" were each appropriate, in English, to the contexts in which they were used.

60. Mr. RENGER (Germany) said that the delegations involved thought that the proposed language was an improvement over the previous version. It might be further improved at some point in the future, but he thought a decision could be taken on the policy implications of the wording proposed.

61. Mr. TELL (France) said that he reserved the right to comment once he had seen the French version of the proposal. He wished to stress the difficulties of working on a proposal available in only one language, especially when the proposal was not in writing. His initial impression was that the only substantive change was the introduction of the word "competing", which was acceptable to his delegation. Any other problems were a matter of drafting, which need not be dealt with in the plenary Commission.

62. The CHAIRMAN said he took it that the proposed wording combining subparagraphs (a) and (b) of paragraph (3) was acceptable in the English version; the other language versions would be adjusted accordingly. The present subparagraph (c), as it appeared in document A/CN.9/XXXIII/CRP.2/Add.1, would become subparagraph (b).

63. Draft article 4, as orally revised, was adopted.

64. The CHAIRMAN recalled that, at its previous meeting, the Commission had considered whether the draft Convention should be referred back to the Working Group.

65. Mr. MOHAMED (Nigeria) proposed that any further consideration of the draft Convention should be undertaken by the Commission, since it was important to achieve the broadest possible participation and Governments of developing countries would be more willing to finance their representatives' attendance at a resumed session of the Commission, which might be convened in January 2001, than at meetings of the Working Group. Furthermore, if the draft Convention was returned to the Working Group, any revisions made would have to be transmitted to States for comments prior to their consideration by the Commission, which was not practical given the short time available.

66. Mr. BURMAN (United States of America) said that his delegation would have no objection to either course of action.

67. Mr. RENGER (Germany) agreed that the convening of a resumed session of the Commission might result in a larger attendance and would certainly expedite the finalization of the draft Convention.

68. Mr. PANG KHARG CHAU (Singapore) said that his delegation supported the Nigerian proposal.

69. Mr. MORÁN BOVIO (Spain) said that the draft Convention should be referred back to the Working Group for reasons of both tradition and economy. No summary records would be produced for meetings of the Working Group, which would result in a considerable saving.

70. Ms. SABO (Observer for Canada) said that, if a resumed thirty-third session was convened in January 2001, the Commission's thirty-fourth session in May would have to be truncated by at least one week. It would be more efficient to refer the draft Convention back to the Working Group.

71. Mr. TELL (France) said that his delegation remained convinced that it would be better for the Commission itself to finalize the text at its thirty-fourth session since the Working Group had already completed its work. Sending the text back to the Working Group would mean that issues on which the Commission had already taken a decision would be reopened, which would be procedurally irregular. His delegation would, however, be prepared to endorse the Nigerian proposal, which constituted a good compromise since it took account of the concerns of delegations that wished to avoid delays in adopting the draft Convention.

72. Mr. MARADIAGA (Honduras) said that, if the Working Group met in December and a resumed session of the Commission was convened shortly thereafter to consider the outcome of the Working Group's work, the adoption of the draft Convention could be expedited considerably.

73. Mr. GHAZIZADEH (Islamic Republic of Iran) said that his delegation was in favour of sending the draft Convention back to the Working Group.

74. Mr. DOYLE (Observer for Ireland), supported by Mr. MARKUS (Observer for Switzerland), said that there appeared to be only limited support for the Nigerian proposal, whereas, at the Commission's previous meeting, a clear majority had favoured returning the text to the Working Group. He saw no need to prolong the discussion.

75. Mr. LAMBERTZ (Observer for Sweden) said that further work on the draft Convention was needed before the Commission reverted to it. He therefore agreed that it should be sent back to the Working Group.

76. The CHAIRMAN said, he took it that the Commission wished to return the draft Convention to the Working Group.

77. It was so decided.

78. The CHAIRMAN then invited the Commission to consider the terms of reference of the Working Group.

79. Ms. SABO (Observer for Canada) said that the delegations which had consulted on the terms of reference she was about to propose had attempted to address concerns that the Working Group should not reopen questions already settled. The proposal was in four parts:

> "1. Beginning with article 18, the Working Group should review those parts of the draft Convention that the thirty-third session of the Commission has not had the opportunity to examine and the text remaining in square brackets in articles 1 to 17.
>
> "2. In light of the modifications made to articles 1 to 17, the Working Group should ensure that the coherence and consistency of the text are maintained.
>
> "3. If, as a result of its consideration of articles 18 through to the annex, the Working Group identifies issues in articles 1 to 17, it should bring these issues to the attention of the Commission with an appropriate explanation and a recommendation, if possible.
>
> "4. As to its working methods, the Working Group should adopt the same approach as the Commission, that is, it should make only those changes that meet with substantial support."

As it worked on articles 18 and following of the draft Convention, the Working Group would identify changes it believed to be necessary in articles 1 to 17 and, rather than alter the text, would make recommendations for the Commission's consideration.

80. Mr. WINSHIP (United States of America) said that there were two pieces of unfinished business the Working Group might also be asked to undertake. First, it might consider the UNIDROIT proposal (A/CN.9/XXXIII/CRP.7), which related to the topic of conflicts with other international agreements dealt with in the second part of the draft Convention. Second, the Working Group might address the question whether a limited definition of location should be devised for

financial institutions. When the Commission had considered a general definition of location and a general provision for branches, there had been some support for a specific rule for branches of financial institutions.

81. In general, the Working Group should not touch the wording of articles 1 to 17, but it might be asked to polish the wording of article 4 (3) (a), from a purely editorial standpoint.

82. Mr. TELL (France) said that the Canadian proposal was very helpful, although it appeared necessary to clarify the mandate of the Working Group with respect to articles 1 to 17. Given the mention of consistency in paragraph 2 of the proposal, for example, he was not sure whether the Working Group was being instructed to make its work on articles 18 through to the annex consistent with articles 1 to 17 or the reverse.

83. His delegation's position was that the Working Group should not touch articles 1 to 17, except for purely editorial reasons. For that reason, it opposed the suggestions by the representative for the United States. Although his delegation was favourable to the idea of a specific rule for branches of financial institutions, since the Commission had discussed the matter at length, it was for the Commission itself to take the matter further at its next session, if it wished. Matters debated by the Commission should not be re-debated by the Working Group; to make exceptions was to open Pandora's box. The same arguments applied to the question of the UNIDROIT draft Convention on International Interests in Mobile Property, but in the latter case there was the additional consideration that on UNIDROIT's side no considerable progress would have been made by the time the Working Group met.

84. Ms. GAVRILESCU (Romania) said that the terms of reference should make clear that, in accordance with Commission policy, everything the Commission had approved and adopted should be left untouched. The Working Group should be specifically instructed not to debate questions and policy already settled or to reopen discussion of articles 1 to 17.

85. Ms. SABO (Observer for Canada) said that her delegation agreed with the French representative that no exceptions should be made to the rule that issues debated by the Commission should remain the concern of the Commission.

86. Mr. PANG KHARG CHAU (Singapore) said he was sure that it was not the intent of the Canadian proposal to authorize the Working Group to alter articles 1 to 17. The language of the proposal might be clarified by adding the words "in reviewing articles 18 through to the annex" to paragraphs 2 and 4 of the proposal, which would make clear that the Working Group must align its thinking with that of the Commission and not the reverse. However, it was perfectly acceptable for the Working Group to make recommendations regarding articles 1 to 17, pursuant to paragraph 3 of the proposal, if it detected difficulties.

ELECTION OF OFFICERS (continued)

87. Mr. MOHAMED (Nigeria), speaking on behalf of the Group of African States, nominated Mr. Gamledin Awad (Egypt) for the office of Vice-Chairman.

88. Mr. Gamledin Awad (Egypt) was elected Vice-Chairman by acclamation.

89. Ms. VIRBICKAIRE (Lithuania), speaking on behalf of the Group of Eastern European States, nominated Ms. Gavrilescu (Romania) for the office of Vice-Chairman.

90. Ms. Gavrilescu (Romania) was elected Vice-Chairman by acclamation.

The meeting rose at 6.05 p.m.

UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.698
6 April 2001

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD OF THE 698th MEETING

Held at Headquarters, New York,
on Tuesday, 27 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

CONTENTS

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of this meeting and of other meetings will be issued in a corrigendum.

00-50465 (E)

/...

The meeting was called to order at 10.10 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4)

1. The CHAIRMAN invited the Commission to consider the proposal submitted by the representative of Canada at the 697th meeting on the terms of reference for the Working Group on International Contract Practices, in accordance with which the Working Group was to examine articles 1-17 of the draft Convention and, where necessary, introduce any changes. A counter-proposal from the Singapore delegation held that the Working Group should restrict itself to making the draft Convention internally consistent. It should not introduce changes to articles that had already been settled.

2. Ms. SABO (Observer for Canada) said that there was little difference between her delegation's proposal and that of the Singapore delegation. Both required that the Working Group should make no policy changes.

3. Mr. MORÁN BOVIO (Spain) expressed a preference for the approach suggested by the Canadian delegation. The Working Group had proved its competence and ability to solve problems. The draft Convention had been completely restructured by the Commission, and any attempt to tie the Working Group's hands might limit its ability to fulfil its mandate. The Canadian proposal had the requisite degree of both strictness and flexibility. Any narrower terms of reference would imply mistrust of the Working Group.

4. Mr. WINSHIP (United States of America) said that his delegation saw little substantial difference between the two proposals, since the Commission would in any case review the Working Group's conclusions. He wished, however, to propose that if any time remained after the completion of its other work, the Working Group should consider a further point of substance, namely, the status of mobile equipment under the draft Convention. As stated in document A/CN.9/XXXIII/CRP.1/Add.9, paragraph 22 quater, the Committee had decided to defer a decision until the Draft Convention on International Interests in Mobile Equipment and its protocols on aircraft, space equipment and railway rolling stock ("the UNIDROIT draft Convention") was closer to completion. That was not the only consideration, however; it was also possible that the draft Convention on assignment of receivables might be intrinsically inappropriate to mobile equipment in view of the working practices of the industries involved. It was an open issue that needed to be settled. The question was whether it should be entrusted to the Working Group or should await the attention of the full Commission. His delegation's preference would be for the former option.

5. The CHAIRMAN said that, since the issue had not been addressed during the Commission's recent deliberations, it would be advisable not to extend the Working Group's terms of reference.

6. Mr. ONG (Singapore) said that he had understood the Canadian proposal to be close to that of his own delegation. It appeared, however, that the Canadian delegation would countenance the Working Group's making changes to the text in relation to issues that the Commission had already settled. The Working Group

could naturally recommend changes, but its entitlement to introduce changes on its own initiative should be restricted to article 18 onwards. If the Working Group redrafted the whole text it would cast doubt on the value of the Commission's work over the past two weeks.

7. Mr. MARADIAGA (Honduras) said that the Commission should not hamstring the Working Group. Significant changes had been made to the draft Convention, so the Working Group would obviously have to review some articles whose content had been decided. It would, of course, have to explain to the Commission any changes that it might make.

8. Mr. RENGER (Germany) said that a considerable number of issues remained open, even in articles 1-17, such as the question of mobile equipment and, if his understanding was correct, the question of location in the context of financial services. The Working Group should not only aim to make the text internally consistent but it should also be empowered to make recommendations.

9. Ms. GAVRILESCU (Romania) expressed her delegation's support for the view that policy decisions already reached by the Commission should not be reopened. There was, however, no reason why the Working Group should not discuss - and have included in its terms of reference - the issues mentioned by the representatives of the United States and Germany.

10. Mr. GHAZIZADEH (Islamic Republic of Iran) concurred with the representative of Spain in supporting the Canadian proposal as it stood. There was no need to impose narrow restrictions on the Working Group.

11. Mr. ATWOOD (Australia) said that, if the Canadian proposal was that the Working Group should be charged with reviewing articles 1-17 and changing the order and wording in the interests of making the text clearer, his delegation was in favour of it. As for the United States proposal, he saw no objection to the Working Group's considering the issue of mobile equipment, provided that it did so after completing the rest of its mandate.

12. The CHAIRMAN said that any fears that in reordering the language of the draft Convention the Working Group would change decisions reached by the Commission had surely been allayed. He wished it formally understood, however, that the Working Group should not change any policy agreed on by the Commission. He also saw merit in the suggestion by the representative of Australia that the issue of mobile equipment should be broached only after the completion of the Working Group's other work. On that understanding, he took it that the Commission wished to adopt the terms of reference submitted by the Canadian delegation.

13. It was so decided.

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (A/CN.9/471 and Add.1-9)

14. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that the entire text of the draft legislative guide had had its first reading before the Commission and some chapters their second. Following the thirty-second session,

the Secretariat had, in accordance with the Commission's instructions, convened an expert group to revise the legislative recommendations in their entirety and to make the text consistent and concise. To that end, some chapters had been merged and repetitious material eliminated, while taking account of the Commission's decisions. It had been agreed at the previous session that the substance of the draft guide was broadly acceptable. It therefore remained for the Commission only to consider the draft legislative recommendations contained in document A/CN.9/471/Add.9. There was no need to consider the accompanying notes, which provided a commentary.

15. The CHAIRMAN invited the Commission to consider the draft legislative recommendations contained in document A/CN.9/471/Add.9 one by one, referring to the notes only when necessary.

16. Mr. WALLACE (United States of America) said that his delegation would refrain from commenting on the majority of the recommendations in the hope that the current exercise could be concluded rapidly and that the Commission would then decide to extend the project through the inclusion of model provisions or a model law on privately financed infrastructure projects.

17. Mr. SARIE-ELDIN (Egypt) said that he strongly supported the proposal for a model law.

18. Ms. NIKANJAM (Islamic Republic of Iran) said that a model law would be of great use to Governments such as her own.

19. Mr. LALLIOT (France) pointed out that in the foreword to the Guide, the user was advised to read the Legislative Recommendations together with the notes; thus, there was little need for further amendment of the former. However, he agreed with the representative of the United States of America that chapters 1 and 7 could be combined.

20. Mr. WIWEN-NILSSON (Observer for Sweden) said that while he was in favour of discussing the possible development of a model law, such discussion should not begin until the Commission had completed its work on the recommendations in order not to delay finalization of the Guide.

Chapeau (A/CN.9/471/Add.9)

21. Mr. REICHEL (Observer for the World Bank) suggested that the chapeau would be improved by the addition of a general admonition that the greater the number of restrictions under domestic law, the harder it would be to implement the projects covered by the Guide; the contracting authorities should be given as much flexibility as possible.

22. Mr. RENGER (Germany) said that new issues should not be raised at such a late stage of the Commission's work.

23. Mr. DARCY (United Kingdom) said that the wording of the chapeau had been carefully chosen and should be left unchanged. It was important for States to realize that if they were serious in their desire to implement privately

financed infrastructure projects, the Guide must be followed quite closely; there was very little room for compromise.

24. The CHAIRMAN suggested that the Commission might consider adding a specific recommendation embodying the World Bank proposal rather than amending the chapeau.

25. Mr. WIWEN-NILSSON (Observer for Sweden) noted that the point raised by the observer for the World Bank had already been made elsewhere in the recommendations and the notes, which had been drafted with care in order to ensure maximum flexibility for the contracting authorities.

26. Mr. LALLIOT (France) said that in view of the Commission's time constraints, it would be best to leave the recommendations in their current form. The World Bank proposal was unnecessary and might even lead to confusion: it constituted a statement rather than a recommendation and, as the observer for Sweden had noted, the underlying principle was already present in the document as a whole. In any case, the contracting authorities must not be led to believe that they were free to do as they liked rather than following the Commission's recommendations.

27. The CHAIRMAN said that there seemed to be little support for the World Bank proposal.

Draft recommendation 1

28. Ms. SANDERSON (Observer for Canada) said that since the words "legislative and institutional framework" were mentioned in the recommendation, they should perhaps be included in the chapeau as well.

29. The CHAIRMAN suggested that the matter should be referred to the Secretariat.

30. Mr. SARIE-ELDIN (Egypt) suggested that "constitutional," should be inserted before "legislative".

31. The CHAIRMAN said that if there was no objection, he would take it that the Commission wished to approve that amendment.

32. It was so decided.

33. Ms. NIKANJAM (Islamic Republic of Iran) proposed that the recommendation should be amended to make it clear that all parties, including the host country, should eliminate undesirable restrictions to private sector participation in infrastructure development and operation.

34. Mr. ESTRELLA FARIA (International Trade Law Branch) said that that point had been made elsewhere.

35. Ms. NIKANJAM (Islamic Republic of Iran) replied that it should also be made in recommendation 1 in order to give it the full authority of the Commission.

36. The CHAIRMAN said that there seemed to be little support for the Iranian proposal.

37. Mr. WIWEN-NILSSON (Observer for Sweden) said that since the Guide did not constitute a legal instrument open to interpretation, he saw little need for redrafting.

38. Draft recommendation 1, as orally amended, was adopted.

Draft recommendation 2

39. Mr. SARIE-ELDIN (Egypt) suggested that the words "to grant the concession and" should be inserted after "empowered".

40. Mr. ESTRELLA FARIA (International Trade Law Branch) said that reference to the granting of concessions had been deliberately avoided in the recommendations because not all national systems distinguished between concessions and project agreements. However, the expression "contracting authority" was defined in paragraph 17 of document A/CN.9/471/Add.1 and should be sufficient.

41. Mr. SARIE-ELDIN (Egypt) said that the use of that expression did not resolve the underlying problem. Some legal systems made a distinction between the contracting authorities and the granting authorities, and it was important to specify which of them was empowered to grant the necessary licences.

42. Mr. WALLACE (United States of America) said that although the United States of America was not a civil law jurisdiction, his delegation supported the Egyptian proposal.

43. The CHAIRMAN said that if there was no objection, he would take it that the Commission wished to approve the proposal made by the representative of Egypt.

44. It was so decided.

45. Draft recommendation 2, as orally amended, was adopted.

Draft recommendation 3

46. Mr. WALLACE (United States of America) proposed that the words "and ownership" should be added after one of the two instances of the word "operation".

47. Mr. DARCY (United Kingdom) proposed the addition of the words "and financing" before "of existing" and the deletion of the word "and" before "operation".

48. Mr. LALLIOT (France) said that he could not support the proposal made by the representative of the United States of America because some legal systems did not permit the granting of concessions for ownership. In reply to the representative of the United Kingdom, he said that the issue of financing was dealt with elsewhere and should not be raised in recommendation 3.

49. Mr. SARIE-ELDIN (Egypt) said that although his own country had a civil law system, he had no objection to the amendments proposed by the representatives of the United States of America and the United Kingdom. With respect to the first point raised by the representative of France, he noted that the words "may include" made it clear that inclusion would depend on whether private ownership of property was permitted under a given legal system.

50. Mr. ONG (Singapore) said that he agreed with the representative of France. The main purpose of the project was to promote the construction, expansion and operation of infrastructure; ownership was a subsidiary issue which, like occupation, lease and transfer, was dealt with in the notes.

51. Mr. WIWEN-NILSSON (Observer for Sweden) said that the purpose of the recommendation was to cover the construction or refurbishment of infrastructure. However, the question of ownership was raised in document A/CN.9/471/Add.2, paragraph 9, and the Commission might wish to discuss whether to consider the desirability of restrictions on the ownership of public property in connection with recommendation 1.

52. Mr. RENGER (Germany) said that he agreed with the observer for Sweden; mention of ownership in recommendation 3 would cause serious problems.

53. Ms. FOLLIOT (France) said that in any case, the issue was covered adequately in chapter VII, paragraphs 7-9 (A/CN.9/471/Add.8).

54. Ms. GAVRILESCU (Romania) and Mr. MARADIAGA (Honduras) said that they associated themselves with the comment made by the representative of France.

55. The CHAIRMAN said that there appeared to be a consensus that recommendation 3 should remain unchanged.

56. Draft recommendation 3 was adopted.

Draft recommendation 4

57. Mr. MORENO RUFFINELLI (Paraguay) said that the recommendation should be made more flexible, since developing countries might need to amend their legislation periodically in order to establish new sectors.

58. Ms. NIKANJAM (Islamic Republic of Iran) suggested that the problem could be solved by replacing the word "should" with "may".

59. Mr. PINZÓN SÁNCHEZ (Colombia) said while he had no objection to that suggestion, it might be better to state that the law should identify the sectors or types of infrastructure in respect of which concessions could not be granted.

60. Mr. RENGER (Germany) said that the Commission should be very careful about changing anything in that carefully worded recommendation. The word "should" was used in other recommendations, and had a stronger meaning than the word "may". He did not foresee any problems with priority questions or negative lists. The law should identify the relevant sectors, and that could be done in a positive or negative way.

61. Ms. NIKANJAM (Islamic Republic of Iran) noted that the word "may" was used in recommendation 3, admittedly in a slightly different context. However, she would accept the Secretariat's decision.

62. Mr. MORENO RUFFINELLI (Paraguay) said he had interpreted the recommendation rather differently from the Secretariat, understanding it as an unnecessary limitation of the sectors in which the privately financed infrastructure projects might take place.

63. Mr. LALLIOT (France) said he shared the views of the German delegation. The Commission had instructed the Secretariat to find wording for the recommendation to make it sound like an incentive. In response to the comment by the Iranian delegation, he noted that the word "may" was used in recommendation 3 in the context of a more general statement, rather than an address to those States which were interested in following the guide's recommendations.

64. The Colombian proposal to make it a negative formulation was worthy of consideration.

65. The CHAIRMAN noted that the issue had been discussed at a previous meeting, and it had been decided that the recommendation should not be formulated in a negative manner.

66. Mr. MARADIAGA (Honduras) said that the document was an extremely valuable instrument, containing very positive recommendations. His country, while following the work of the Commission, had already passed a law on concessions that was based on the draft guide.

67. He shared the concern of the representative of Paraguay that some countries might have requirements that were not considered in the draft. The recommendation should be phrased in such a way that countries would be free to incorporate sectors that were not already specifically mentioned. Members should recall that the Commission was comprised of representatives of both developed and developing countries.

68. Mr. ONG (Singapore) noted that the concerns of the representatives of Paraguay and Honduras were probably addressed in paragraph 18 of document A/CN.9/471/Add.2, which indicated that recommendation 4 was not intended only as a positive delimitation of types of projects that would be permitted.

69. The CHAIRMAN noted that the recommendations were not intended to hamstring Governments but were offered for their consideration when dealing with publicly financed infrastructure projects in their countries.

The meeting was suspended at 11.45 a.m. and resumed at 12.10 p.m.

70. Mr. DARCY (United Kingdom) associated himself with the comments made earlier by the German delegation. The word "should" was very important because it made clear to potential private sector investors and bidders which areas they could legitimately take an interest in.

71. The CHAIRMAN said that, in the absence of a consensus, and in the light of the fact that some of the concerns expressed were addressed in the notes, he assumed that recommendation 4 would be accepted in its present form.

72. Draft recommendation 4 was adopted.

Draft recommendations 5-12

73. Draft recommendations 5-12 were adopted.

Draft recommendations 13 and 14

74. Mr. WALLACE (United States of America) suggested adding, after the word "support" in the second line, the words ", including public loans and guarantees, equity participations, subsidies and sovereign guarantees and assurances,". The wording was taken from the notes, but would make the recommendation clearer to the legislator. Alternatively, the new text could be added in the third line after the words "types of support".

75. Mr. SARIE-ELDIN (Egypt) wondered whether recommendation 13 was feasible at all, as it did not seem possible in practice to specify by law one authority to provide all the types of guarantees referred to.

76. Mr. WALLACE (United States of America) noted that the word "authorities" was used in the plural. It was essential to specify from which ministries or agencies guarantees could be obtained, as problems had arisen in the past when it had not been clear which body was responsible. There was a clear connection with recommendation 2.

77. The CHAIRMAN asked the Secretariat whether the issue had been discussed at the previous session of the Commission.

78. Mr. ESTRELLA FARIA (International Trade Law Branch) noted that the recommendation did indeed reflect a policy directive of the Commission.

79. The term "public authorities" had been used in the plural to indicate that more than one might be specified, but the decision as to which authorities could provide which type of assurance was an internal matter for the host country. It would not necessarily all have to be covered by the same piece of legislation, which was why the generic phrase "the law" had been used, without specifying which law.

80. Ms. FOLLIOT (France) and Mr. DARCY (United Kingdom) supported the United States proposal.

81. Ms. Li Ling (China) and Mr. MARADIAGA (Honduras) preferred recommendation 13 to remain unchanged.

82. The CHAIRMAN, in the absence of a consensus, assumed that the concerns raised would be met by the text of the notes, and that the present wording of recommendation 13 would be retained.

83. It was so decided.

84. Draft recommendations 13 and 14 were adopted.

Draft recommendation 15

85. Mr. ESTRELLA FARIA (International Trade Law Branch) noted that the Secretariat would be grateful if members of the Commission could point out any difficulties of translation in the Arabic, Chinese and Russian versions of the document. The Secretariat could deal with the other languages involved.

86. In the French text of recommendation 15, the words used to translate the English expression "competitive procedures" seemed literally to mean "open procedure".

87. The term "competitive procedures" had been chosen after extensive discussions at previous sessions. It was understood to mean that prospective concessionaires would be invited to present offers and to compete with regard to the terms of their offers for the contract being offered. It was not a technical expression, as they did not want a term that referred to any specific type of procedure already known under domestic law. There had been an extensive debate on that issue, and on how the general provisions related to the exceptions described later in the chapter. There was no reference to bidding or tendering or other procedures used in other types of procurement contracts, as the chapter should not look like a general procurement code. The prospective concessionaires were to compete for the award of the project.

88. He asked the French-speaking members of the Commission to clarify whether that phrase adequately expressed the meaning of the English text.

89. Ms. FOLLIOT (France) said that procédure ouverte was the French term used in the European guidelines on the awarding of contracts. Therefore, if official terminology relating to public contracts was to be avoided, procédure ouverte could not be used. Her delegation proposed that the term should be replaced by procédure de mise en compétition, which did not have any special technical meaning and reflected the Secretariat's point of view.

90. Mr. MAZZINI (Observer for Morocco) said that his delegation supported the French proposal. The Arabic translation of "competitive procedure" was correct.

91. Mr. SARIE-ELDIN (Egypt) said that chapter III contained no reference, either in the recommendations or the notes, as to whether the Commission wished to encourage legislators to have a specific law on the selection of the concessionaire, particularly for privately financed infrastructure projects. He wondered whether the Commission had considered that policy matter.

92. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the Commission had not made any strict recommendation as to whether such issues

should be dealt with in one specific law or in several. In general, the approach that had been taken was that any piece of legislation that dealt specifically with privately financed infrastructure projects could either incorporate the entire selection process or simply contain a cross reference to the most appropriate procurement method obtainable in the host country.

93. Ms. GAVRILESCU (Romania), and Ms. ALLOUCH (Observer for Canada), supported the French proposal.

94. The CHAIRMAN said that the term proposed by the representative of France would replace the term procédure ouverte in the French text of recommendation 14.

95. Draft recommendation 15, as orally amended, was adopted.

Draft recommendations 16-20

96. Draft recommendations 16, 17 and 19 were adopted.

97. Mr. WALLACE (United States of America) said that, since recommendations 18 and 20 were related, the words "should invite" in recommendation 18 should be amended to read "should request" in order to be in line with the words "final request" in the first line of recommendation 20.

98. The CHAIRMAN said that the Commission accepted the editorial change proposed by the representative of the United States of America.

99. Draft recommendations 18 and 20, as orally amended, were adopted.

Draft recommendations 21 and 22

100. Mr. RENGER (Germany) said that, in an earlier document, recommendation 21 had appeared as recommendation 7, which had contained subparagraphs (a) and (b). Subparagraph (b) dealt with the importance of the obligation to keep minutes of meetings of the bidders that were convened by the contracting authority. He wished to know why recommendation 21 did not reflect the content of recommendation 7, which he believed had been accepted by the Commission.

101. Mr. ESTRELLA FARIA (International Trade Law Branch) said that, in reviewing the recommendations with the assistance of outside experts, the Secretariat had borne in mind one of the comments that had been made by the Commission in its consideration of chapter III. It had been proposed that, since recommendation 38 dealt with the subject of record keeping, such record-keeping obligations would apply throughout the procurement process. Paragraph 125 (f) of document A/CN.9/471/Add.4 referred to "a summary of any requests for clarification of the pre-selection documents or the request for proposals, the responses thereto, as well as a summary of any modifications of those documents". While it might not be apparent that that included keeping proper records and minutes of meetings, the Secretariat believed that, for economy of language, paragraph 125 (f) was the most appropriate place to make the reference, bearing in mind that recommendation 38 contained a general reference to record keeping.

102. Mr. MORÁN BOVIO (Spain) said that paragraphs 71 and 72 of document A/CN.9/471/Add.4, particularly the last sentence of paragraph 72, provided an answer to the question raised by the representative of Germany.

103. Draft recommendations 21 and 22 were adopted.

Draft recommendation 23

104. Mr. WALLACE (United States of America) said that, since the tolls, fees and other charges referred to in recommendation 23 (a) normally accrued to the concessionaire, he wished to know whether such tolls, fees and charges should be low or high. Since subparagraphs (b) and (d) were related, he wondered whether or not they should be combined. Drawing attention to paragraph 77 of chapter III in document A/CN.9/471/Add.4, which stated that the contracting authority should consider carefully the relative importance of the proposed unit price for the expected output as an evaluation criterion, he proposed the addition of a new subparagraph (g), which would refer to the "unit price approach" as described in paragraph 77.

105. Mr. ESTRELLA FARIA (International Trade Law Branch) said that an extensive discussion had been held about the public service nature of most privately financed infrastructure projects and the interest of the contracting authority in ensuring a certain level of quality of service. One of the criteria determining the acceptability of the proposal that the contracting authority might wish to take into account was the amount that it would have to pay for that service. Such payment did not involve income for the contracting authority but was an expense for the general public. There was therefore a public interest in including that as an evaluation criterion.

106. In an extensive debate concerning subparagraphs (b) and (d), the representative of France had pointed that, if the contracting authority was making a payment for a service that was being provided to it, the payment did not represent a form of government support but was simply the fulfilment of a contractual obligation by the concessionaire to the benefit of the contracting authority. For reasons of clarity, it was deemed that that subject should not be dealt with in the chapter concerning government support. A distinction had therefore been made in recommendation 23 between subparagraphs (b) and (d). Subparagraph (d) dealt with other forms of support, such as subsidies and guarantees, that might not be provided by the contracting authority itself but by someone else.

107. Instead of adding a new subparagraph (g), perhaps additional language could be added to subparagraph (a).

108. Mr. WALLACE (United States of America) said that his delegation accepted the Secretariat's comments and suggestion.

109. Mr. RENGER (Germany) said that the Secretariat should provide further explanation about subparagraph (f), which seemed to contain a new text. He wished to know whether the words "the proposed contractual terms" referred to the contractual terms for the financing or the contractual terms for the concession.

110. Mr. ESTRELLA FARIA (International Trade Law Branch) said that there had been a debate on the subject, in which the representative of the United Kingdom and the observer for Sweden had taken part. Basically, the issue concerned the degree of responsiveness of the proposal to the contractual terms. The distinction between what was financial and what was not had not been made entirely clear, since many of the terms of the contract appeared to deal only with legal issues, such as compensation due upon termination. Perhaps the delegations that had participated in the previous year's discussion would be in a better position to enlighten the Commission.

The meeting rose at 1 p.m.

UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.699
6 April 2001

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD OF THE 699th MEETING

Held at Headquarters, New York,
on Tuesday, 27 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

CONTENTS

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of this meeting and of other meetings will be issued in a corrigendum.

00-50477 (E)

/...

The meeting was called to order at 3.05 p.m.

DRAFT LEGISLATIVE GUIDE ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/471 and Add.1-9)

Draft recommendation 23 (continued)

1. The CHAIRMAN invited the Commission to resume consideration of the draft recommendations in the draft Legislative Guide on Privately Financed Infrastructure Projects (A/CN.9/471/Add.9).

2. Mr. SARIE ELDIN (Egypt) said that draft recommendation 23 (f) was very important and should not be changed. It should be borne in mind that the recommendation dealt with both financial and commercial aspects of proposals.

3. Ms. NIKANJAM (Islamic Republic of Iran) said that her delegation was satisfied with draft recommendation 23 as it stood, including (f).

4. Ms. FOLLIOT (France) said that her delegation had several amendments to propose to draft recommendation 23. First, it was in favour of eliminating (f) as superfluous, since comparison of the proposals with the proposed contractual terms was implicit in the entire process of evaluating proposals. Logically, (f) should either be eliminated from draft recommendation 23 or added to draft recommendation 22, since it could be considered equally pertinent, or self-evident, in relation to the technical evaluation.

5. Second, draft recommendation 23 (a) to (e) could be arranged in a more logical fashion. The soundness of the proposed financial arrangements, currently in (e), was in fact the topic of draft recommendation 23. The phrase should be placed first as (a) or in the chapeau. Under it, a distinction should be drawn between two financing modalities, which the bidder should be asked to set forth, one for the period of construction and the other for the period of operation, differentiating, for each phase, between the amount of financing that was to come from operating revenues, such as fees and charges, and the amount that was that to come from government support.

6. Ms. GIOIA (Italy) said that her delegation supported the proposal to delete (f) as superfluous and felt the distinction between the various sources of financing during different phases was valuable. Draft recommendation 23 (d), which referred to financial support from the Government, might be worded more broadly in order to encompass other sources of public-sector financing.

7. Mr. SARIE ELDIN (Egypt) said that there was a very important rationale for the inclusion of (f). Bidders often made exceptions or reservations to the proposed contract terms. Too many reservations might reduce the acceptability of their proposals and might imply longer negotiation times and additional cost to the contracting authority. It was therefore quite legitimate and often necessary, when evaluating a proposal, to take into consideration the extent to which the proposal deviated from the proposed contractual terms.

8. The distinction drawn between financing in the construction and operating phases was a valid one, but his delegation believed that the language of draft recommendation 23 sufficiently covered the situation and should remain unchanged.

9. Mr. WIWEN-NILSSON (Observer for Sweden) said that he fully supported the Egyptian position. It must be borne in mind that, whereas in conventional procurement it was easier for the contracting authority to insist on exact compliance with its terms, such insistence in infrastructure projects had proved to be nearly impossible. For one thing, lenders had an important say in the final contract terms. Draft recommendation 26 and the notes relating to the section (A/CN.9/471/Add.4, paras. 51-84) drew a distinction between negotiable and non-negotiable terms. The non-negotiable terms must, of course, be met in order for any proposal to be considered, but proposals might differ considerably in the number of negotiable deviations. The risk allocation originally proposed by the contracting authority was rarely accepted. It was therefore important for the contracting authority to be able to apply the criterion stated in (f). With regard to financial soundness, he could see the value of distinguishing between different phases.

10. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the Commission, at its previous session, had decided to accommodate the full spectrum of procurement situations and allow for flexibility. At one extreme were countries that had already elaborated sophisticated contractual terms or that had legal systems requiring rejection of proposals that did not fully comply with the proposed contractual terms. But there were others that would prefer to allow the terms to evolve throughout discussions with the bidders. Some countries insisted on a minimum compliance with the original terms. The concept of non-negotiable terms appeared in draft recommendation 26, and a similar concept was expressed in draft recommendation 24, which spoke of thresholds that must be met before a proposal could be considered.

11. The extent-of-acceptance criterion was not included in draft recommendation 22 because the latter dealt only with technical evaluation, whereas draft recommendation 23 dealt with evaluation of the financial and commercial terms. Commercial terms might include provisions on liquidated damages and other issues related to allocation of risk, which were frequently left to later negotiations.

12. Mr. MARADIAGA (Honduras) noted that the meaning of "proposed contractual terms" in draft recommendation 23 (f) was explained by draft recommendation 20 (c) in the same chapter, which referred to "the contractual terms proposed by the contracting authority". In his delegation's view, (f) was clear and should be left as it stood.

13. Ms. FOLLIOT (France) said she believed that the notion expressed in (f) was implicit in the evaluation process, but if the Commission wished to make it explicit, it should also appear in draft recommendation 22, since the degree to which the proposal complied with technical specifications was also, surely, an evaluation criterion.

14. Mr. LALLIOT (France) said that his delegation wished to propose a compromise, whereby draft recommendations 22 and 23 would begin with similar wording. Draft recommendation 22 would begin: "In conformity with the proposed contractual terms, the criteria for evaluation ..."; draft recommendation 23 would begin: "In conformity with the proposed contractual terms and in order to judge the soundness of the proposed financial arrangements, the criteria for evaluation ...". Draft recommendation 23 (e) and (f) would be taken up into the chapeau. The remaining parts could be rearranged: (c) would be placed first, followed by (a), with the addition of the words "unit price" after "fees", as proposed by the United States delegation; last would come (b) and (d) combined into one, again as proposed by the United States. Nothing would be lost, and logic and elegance would be gained.

15. Ms. MANGKLATAKUL (Thailand) said that her delegation had been convinced of the benefit of retaining (f). Since no purpose appeared to be served by the French proposal, draft recommendation 23 should remain as it stood.

16. Mr. KASHIWAGI (Japan) said that his delegation agreed with the positions expressed by the representative of Egypt and the Secretariat.

17. Mr. PINZÓN SÁNCHEZ (Colombia) said he agreed with the suggestion of Italy that draft recommendation 23 (d) should be more broadly worded, so that it referred to financial support not just from the Government but from other public-sector sources.

18. Mr. ESTRELLA FARIA (International Trade Law Branch) pointed out that the term "Government" had been broadly defined in the notes (A/CN.9/471/Add.1, para. 16).

19. Mr. LALLIOT (France) asked whether the inclusion of the clause expressed in draft recommendation 23 (f) but nowhere in draft recommendation 22 meant that in evaluating technical proposals conformity to specifications was not a concern.

20. Mr. ESTRELLA FARIA (International Trade Law Branch) said that (f) was worded to refer back to the contractual terms mentioned in draft recommendation 20 (c), whereas the whole of draft recommendation 22 referred back to the project specifications and performance indicators mentioned in draft recommendation 20 (b). That meant that the wording of an analogous phrase in draft recommendation 22 would have to be somewhat different. He did not believe, however, that such a phrase would be contrary to the policy worked out by the Commission.

21. The CHAIRMAN said that, as he understood it, the intent of draft recommendation 23 (f) was to draw particular attention to the need for Governments to consider the extent of compliance with the proposed contractual terms relating to commercial aspects when awarding contracts.

22. Mr. WALLACE (United States of America) said that draft recommendations 23 and 24 taken together provided a combination of minimum conformity requirements, or "thresholds", with respect to both technical and commercial aspects, while allowing for more flexibility in proposed contractual terms than was usual in

straight procurement transactions. His delegation thought the right balance had been struck.

23. The CHAIRMAN suggested that draft recommendation 23 should be adopted as drafted, because the concerns expressed were dealt with in subsequent paragraphs.

24. Draft recommendation 23 was adopted.

Draft recommendation 24

25. Mr. WIWEN-NILSSON (Observer for Sweden) said that, for the sake of consistency, the word "financial" should be inserted in the series "technical and commercial aspects".

26. Mr. ESTRELLA FARIA (International Trade Law Branch), responding to a question from the Chairman, said that he did not recall any policy decision by the Commission not to include financial aspects.

27. Draft recommendation 24, as orally amended, was adopted.

Draft recommendation 25

28. Draft recommendation 25 was adopted.

Draft recommendations 26 and 27

29. Mr. WIWEN-NILSSON (Observer for Sweden) pointed out that the heading of the section in the recommendations, "Final negotiations", did not coincide with the heading of the corresponding section in the notes (A/CN.9/471/Add.4, sect. C.6), which read "Final negotiations and project award".

30. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the heading in the notes should be shortened to correspond to the heading in the recommendations, since project awards were dealt with in a later section.

31. The CHAIRMAN said he took it that the Commission wished to make the change suggested by the Secretariat.

32. It was so decided.

33. Mr. SARIE ELDIN (Egypt) asked whether the Secretariat or the expert committee had considered the very common situation in which, after selection of the concessionaire but before the financial closing, lenders called for changes in the agreements. It would be very helpful if some advice could be given to Governments on how to deal with the problem.

34. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the matter had been discussed by the Commission and in consultations with experts. The problem was dealt with briefly in paragraph 70 of the notes on chapter III (A/CN.9/471/Add.4), where it was suggested that the contracting authority should require the final proposals to show that the bidder's main lenders were

comfortable with the commercial terms and allocation of risks. The last sentence of draft recommendation 26 suggested that the final request for proposals should identify certain terms as non-negotiable. The United Kingdom procurement guidelines for privately financed infrastructure projects contained a similar recommendation. What a Government could or should do if lenders nonetheless insisted on reopening certain issues would depend on the country's general policy.

35. The CHAIRMAN said that one aspect of the question was whether the last sentence of draft recommendation 26 was meant to apply not only to the successful bidder but also to third parties, such as the lenders.

36. Mr. NDJOG NYOBE (Cameroon) inquired how the contracting authority was supposed to respond, if two bidders both achieved the best rating.

37. Mr. WALLACE (United States of America), replying to the query raised by the Chairman, referred to the statement in paragraph 83 of the notes (A/CN.9/471/Add.4) that the final negotiations should satisfy the "reasonable requirements" of the selected bidder's lenders. Although the final negotiations had not been discussed, as far as he could recall, there had been some discussion of direct agreements between lenders and contracting authorities. The point raised by the representative of Egypt had indeed been discussed, at a meeting of experts. One positive feature of the draft Guide, which sought to change behaviour rather than merely reporting on it, was to bring to the attention of contracting authorities the pressure which might be exerted on bidders by their lenders, and the need to persuade lenders to commit themselves at an earlier stage. That point was covered in paragraphs 70 and 83 of the notes. However, direct deals between lenders and Governments had not been specifically addressed in recommendation 26.

38. Mr. MYERS (Observer for the International Bar Association) recalled that the matter had been fully discussed at a meeting of experts, but the industry had not yet succeeded in solving the problem, nor could it be solved through the recommendations in the draft Guide. The difficulty was that lenders did not pay attention to projects until they were sure that their team would win the tender; at that point, they often stated that they would not finance the project unless certain particulars were changed. There was a need to tie lenders down at an earlier stage in the project. The only proposal to that effect was the one referred to by the Secretariat, as contained in the notes.

39. Mr. SARIE ELDIN (Egypt) said that recommendation 26 did not meet the concerns of his delegation. His country and others, such as Mexico and Indonesia, were familiar with the situation in which a lender would enter a deal after extensive negotiations, when the project documents had already been signed. Some issues, such as assignment and stepping-in rights, could be covered by direct agreement. On other issues, such as risk allocation, lenders might request an amendment in the actual project documents. The Commission should consider making a recommendation to contracting authorities advising how that situation should be dealt with in a legal sense. Project companies could find themselves in difficulty; being reluctant to lose a contract, they would sometimes leave it to lenders to pursue the negotiations. The Commission could

perhaps stipulate that lenders should not be allowed to renegotiate matters which could not be renegotiated by project companies or bidders.

40. The CHAIRMAN agreed that the issue was an important one which should be drawn to the attention of contracting authorities. He asked whether the problem should be discussed in the notes, or whether the Commission wished to formulate an additional recommendation.

41. Mr. WALLACE (United States of America) pointed out that the Commission was preparing a legislative guide, not a manual on how to deal with banks. The issue would have to be confined to the notes, where it was already discussed, in paragraph 83 of document A/CN.9/471/Add.4. Governments should take a stronger line, stating their requirements clearly in the bidding documents and then holding the bidders to them.

42. Mr. WIWEN-NILSSON (Observer for Sweden) agreed. The Commission should be careful not to include in the recommendations anything which would discourage private-sector financing.

43. Mr. ESTRELLA FARIA (International Trade Law Branch), referring to the question raised by the representative of Cameroon, said that it had not previously been discussed by the Commission.

44. Mr. DARCY (United Kingdom) said that he was familiar with the situation described by the representative of Cameroon. Some countries, including his own, occasionally tried to bring two bidders forward to final negotiations, in order to intensify the competition. That should perhaps be reflected in the language of recommendation 26, by referring to "bidders" in the plural.

45. Mr. WALLACE (United States of America) thought that it would be dangerous to refer to "bidders", which could signify a plurality of bidders, not just two. Competition was certainly a good thing, but it would be better to make reference in the notes to the situation described by the representative of Cameroon.

46. The CHAIRMAN observed that it was a situation which sometimes occurred in high-value projects.

47. Ms. NIKANJAM (Islamic Republic of Iran) favoured the solution proposed by the representative of the United Kingdom.

48. Mr. DARCY (United Kingdom) withdrew his proposal. He agreed with the representative of the United States that it might be hazardous to refer in the recommendation to "bidders" in the plural. However, reference could be made in the notes to the fact that in some situations, it was necessary to take more than one bidder through to final negotiations.

49. Draft recommendations 26 and 27 were adopted.

Draft recommendations 28 and 29

50. Mr. DARCY (United Kingdom) proposed amendments to recommendations 28 and 29. The title "Direct negotiations" was confusing and did not adequately

describe the subject. For the sake of clarity, he suggested replacing it by "Contract award without competition". He was not entirely happy but was prepared to accept recommendation 28 (e) and (f). With regard to recommendation 29, he proposed adding measures to ensure transparency, which was particularly important where there was no competitive procedure. Several of the existing provisions, especially (c), would be irrelevant if there was only one bidder. He therefore suggested deleting (b), (c) and (e), and moving (d) to a later point in the draft Guide, since it was a general consideration which applied in all selection and award procedures. Recommendation 29 (f) should become (b) and should read: "The offer should be evaluated according to the criteria for the evaluation of proposals established by the contracting authority". A new (c), intended to enhance transparency, would read: "Public notices of contract awards should disclose the specific circumstances and reasons for the award without competition". If those proposals were accepted, appropriate amendments should be made to the notes.

51. Mr. WALLACE (United States of America) welcomed those proposals but pointed out that they would alter the section as it stood, which contemplated the possibility of more than one bidder. For example, paragraph 89 (d) of the notes (A/CN.9/471/Add.4) referred to "cases where there is only one source capable of providing the required service", namely, a sole source of procurement. The proposed changes would also affect recommendation 35, concerning direct negotiations with the author of an unsolicited proposal, which would also contemplate more than one bidder.

52. Ms. NIKANJAM (Islamic Republic of Iran) said that her only concern with regard to the United Kingdom proposals was the requirement to disclose, through public notices, the circumstances in which an award had been made. What would happen if those circumstances had to be kept confidential for reasons of security or the national interest?

53. Mr. LALLIOT (France) supported the United Kingdom proposal. The proposed amendment to the title of recommendation 28 would dispel its ambiguity. The text of the recommendation must be altered in consequence, for the sake of consistency. The proposed amendments to recommendation 29, especially the new (c), would provide for greater transparency in the award of contracts.

54. Mr. ESTRELLA FARIA (International Trade Law Branch), referring to the point raised by the Iranian representative, said that no requirement concerning security had previously been included in recommendation 29. If the Commission so wished, an appropriate reference such as that in recommendation 28, subparagraph (c), could be included in recommendation 29. Concerning the question of a plurality of bidders, which would enhance competition, that situation had in fact been envisaged previously by the Commission in recommendation 29. An appropriate reference could be made in the notes to the desirability of ensuring a minimum level of competition if negotiations involved more than one party.

55. Mr. RENGER (Germany) said there was no need to revert to a previous decision by the Commission. It had been made clear, in paragraph 128 of the previous year's report, that the title "Direct negotiations" should be retained.

The meeting was suspended at 4.25 p.m. and resumed at 4.55 p.m.

56. The CHAIRMAN asked whether the Commission believed that the title "Direct negotiations" reflected a firm UNCITRAL decision.

57. Mr. REICHEL (Observer for the World Bank) said that he supported the United Kingdom proposal in the interests of clarity and transparency.

58. Mr. KASHIWAGI (Japan) also expressed support for the United Kingdom proposal.

59. The CHAIRMAN said that he took it that the Commission wished to adopt the United Kingdom proposal regarding the title of the section comprising recommendations 28 and 29, and similarly to replace the term "direct negotiations" wherever it occurred in the text of those recommendations.

60. It was so decided.

61. Mr. MOHAMMED (Nigeria), referring to the issue of confidentiality raised by the Iranian delegation, said that in the real world it was often not possible to provide the required information, or else the requirement was not respected. He therefore agreed with the Iranian delegation that the matter was best not included in the draft.

62. Mr. WALLACE (United States of America) said that, while Nigeria's point was valid, the very first clause of recommendation 28, to the effect that the law should set forth the exceptional circumstances, constituted both a general record-keeping requirement and indicated that good procurement practice under the UNCITRAL Model Procurement Law required any movement from a competitive to a less competitive or non-competitive method to be justified, along the lines suggested in the United Kingdom proposal. Something had to be said, including at least a reference to approval by a higher authority. Otherwise the normal competitive method could be abandoned altogether without explanation.

63. Mr. WIWEN-NILSSON (Observer for Sweden) said that perhaps the Iranian concern could be addressed under the exception made in recommendation 28 (c) for reasons of national defence or national security.

64. The CHAIRMAN said that a way had to be found, however, to ensure that the principle underlying recommendations 28 and 29 would not be undone by a simple declaration that a particular project affected national security.

65. Ms. FOLLIOT (France) said that two issues were involved. The confidentiality of the negotiations themselves between the two future contracting parties had to be distinguished from the question of recourse to a non-competitive contract award procedure, requiring a subsequent public notice. Nothing had been stipulated, however, about the degree of specificity of that public notice, and therefore a Government could simply invoke one of the exceptions in recommendation 28, for instance, the exception in (c), for reasons of national defence or national security.

66. The CHAIRMAN agreed that the issue was not the confidentiality of the negotiations but rather whether there should be any exceptions to the proposed requirement for public notice and justification.

67. Ms. NIKANJAM (Islamic Republic of Iran) said that her concern had been to have included among the exceptions in recommendation 28 situations requiring confidentiality. She agreed that (c) concerning reasons of national defence or national security would, as suggested, be a good place for such language.

68. Mr. ESTRELLA FARIA (International Trade Law Branch) suggested that the Iranian concern could be accommodated by amending the proposed United Kingdom formulation of the new (c) in recommendation 29, so that it would read: "Except for the situations provided for in recommendation 28 (c), public notices of contract awards should disclose the specific circumstances and reasons for the award without competition." Moreover, the words "of the contract" or "of the project" should probably also be added after the word "award".

69. Mr. DARCY (United Kingdom) accepted the Secretariat's suggestion in response to the concerns of the Iranian delegation.

70. The CHAIRMAN said he took it that the Commission wished to adopt draft recommendations 28 and 29, as reformulated by the United Kingdom and the Secretariat.

71. It was so decided.

72. Draft recommendations 28 and 29, as orally amended, were adopted.

Draft recommendations 30 to 34

73. Draft recommendations 30 to 34 were adopted.

Draft recommendation 35

74. Mr. WALLACE (United States of America) said that the reference at the end of recommendation 35 should be to recommendation 29 (b) to (f), rather than 27 (b) to (f); however that would have to be altered in the light of the United Kingdom amendments just adopted.

75. The kind of unsolicited proposals procedure set out in recommendation 35 contemplated the possibility of negotiations with more than one party, and the Commission must decide where to deal with the issue. It might have been appropriately included as one more exception in the list given in paragraph 89 of the notes (A/CN.9/471/Add.4), in relation to recommendation 28.

76. Mr. ESTRELLA FARIA (International Trade Law Branch) recalled that the set of provisions regarding negotiations with more than one bidder, which had originally been included in recommendation 29, had been deleted by the adoption of the United Kingdom proposal. In keeping with the principle that the draft Legislative Guide was not intended to replace the procurement regime of the host country, which would continue to provide the framework for negotiations with more than one party, one possibility would be to have the notes describe the principles of competitiveness and transparency that should preside over negotiations more fully than recommendation 29 had done, with references to the relevant provisions of the UNCITRAL Model Procurement Law. That would obviate

the need to include more recommendations on the matter or to reproduce the entire procurement regime in chapter III.

77. Specifically, paragraphs 90 to 96 of the notes (A/CN.9/471/Add.4) - formerly relating to recommendations 28 and 29 - should be shifted to section E, Unsolicited proposals. There should be a general statement to the effect that, whenever the law authorized the contracting authority to award a contract without competition, either under the circumstances referred to in recommendation 28 or in the case of unsolicited proposals, measures to enhance transparency should be followed. The current text of paragraphs 90 to 96 would then follow.

78. The CHAIRMAN said he took it that the Commission agreed that the Secretariat should be entrusted to make the changes indicated.

79. It was so decided.

80. Draft recommendation 35 was adopted.

Draft recommendations 36 and 37

81. Draft recommendations 36 and 37 were adopted.

Draft recommendation 38

82. Mr. WIWEN-NILSSON (Observer for Sweden) suggested that the confidentiality provision originally in recommendation 29 (d), which the Commission had decided to place later in the draft, should be addressed in the context of recommendation 38.

83. Ms. FOLLIOT (France), concurring, said that any recording of key information raised the question of access to that information and the extent to which it should be divulged.

84. The CHAIRMAN said that there were two issues: the fact that recommendation 38 did not set out the circumstances under which the public could or could not have access to such information; and the question whether the law should set out those circumstances.

85. Mr. ESTRELLA FARIA (International Trade Law Branch) said he himself believed that the confidentiality provision should go before recommendation 36, because the obligation of confidentiality was one that applied even before the end of the selection process. The language of former recommendation 29 (d) should be amended to read: "When the contracting authority is authorized to award a project without competition, any such negotiations ...". The point raised by France had been considered the previous year, and it had been thought unlikely that the Commission could arrive at a common understanding of the level of disclosure of records of the selection process in relation to the various types of requests for access. He drew attention to paragraphs 128 to 130 of the notes (A/CN.9/471/Add.4) on the question. In the draft Legislative Guide generally, it was left to the laws of the host country to determine disclosure regulations.

86. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the suggestion made by the Secretariat in response to the concerns expressed by the observer for Sweden.

87. Mr. WIWEN-NILSSON (Observer for Sweden) said that in the report of the Secretary-General (A/CN.9/471/Add.4), the discussion concerning disclosure of confidential information was in paragraph 129, under the heading "Record of selection and award proceedings". In order to ensure consistency between the report and the consolidated legislative recommendations (A/CN.9/471/Add.9), it might be better to place recommendation 29 (d), which dealt with confidentiality, under the same heading in both documents.

88. Mr. ESTRELLA FARIA (International Trade Law Branch) said that while the points made by the observer for Sweden and the representative of France were related, they were not exactly the same. One issue was the disclosure of information contained in the record of the selection proceedings; the other was the confidentiality of negotiations between the contracting authority and the bidders. Those were different situations. Since the obligation of confidentiality during negotiations would apply whenever negotiations took place, the issue should be addressed before the Commission considered the outcome of the selection process. Moreover, in revising the text, the Secretariat should ensure that the notes were consistent, and that references to the confidentiality of negotiations should be in keeping with later statements concerning disclosure of the record of the selection proceedings.

89. The CHAIRMAN said he took it that the Commission agreed that the text of recommendation 29 (d) should be placed after recommendation 38. With regard to the suggestion made by the representative of France that the legislative recommendations should address the issue of what information should be made available regarding the selection proceedings and how it should be made available, the principle adopted thus far was that the matter should be left to national legislation. If that was acceptable to the Commission, then the discussion could move on. If, however, the matter was taken up at the current meeting, that would prolong the debate.

90. Mr. MORÁN BOVIO (Spain) said that he agreed with the Secretariat's approach. The matter should be left to national legislation. There was no point in introducing into the draft Legislative Guide the possibility of modifying firmly entrenched national practices.

91. Mr. LALLIOT (France) said it was clear from paragraphs 128 to 130 of the report that the matter should remain within national jurisdiction by virtue of the principle of subsidiarity. It should be made clear in recommendation 38 also that national law should define the modalities of access to information and records. He also suggested that recommendation 36, concerning review procedures, should be placed at the end of the chapter.

92. The CHAIRMAN noted that the second sentence of recommendation 38 read, in English, "The law should set forth the public access requirements". He wondered whether there might be a discrepancy between the English and French versions.

93. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the second sentence of recommendation 38 was missing in the French version. The Secretariat would rectify the omission.

94. Draft recommendation 38, as orally amended, was adopted.

Draft recommendation 39

95. Mr. SARIE ELDIN (Egypt) said that the title of chapter IV did not reflect the contents, which were not limited to construction and operation of infrastructure. Recommendations 41 and 42 related to the organization of the concessionaire, while recommendations 45 and 47 related to financial arrangements. He suggested that chapters IV and V should be combined, since they both dealt with the project agreement as such.

96. Mr. ESTRELLA FARIA (International Trade Law Branch) said that the chapter had originally been entitled "Project agreement", but that title had not been retained because many of the issues dealt with in the chapter were of a statutory nature and not of a contractual nature.

97. Mr. RENGER (Germany) said that the word "might" should be changed to "should".

98. Mr. WALLACE (United States of America) said that he was not in favour of changing "might" to "should". With regard to the suggestions made by the representative of Egypt, he believed that the approach of combining chapters IV and V was too radical. As to the title of chapter IV, he agreed with the representative of Egypt that it would not be inappropriate to add "project agreement" to the title of chapter IV.

99. Mr. MORÁN BOVIO said that it might be better to reconsider the title of the chapter once the document had been completed.

100. Mr. RENGER (Germany) drew attention to the fact that the words "project agreement" also appeared in chapter V.

101. The CHAIRMAN said that there was insufficient support for combining chapters IV and V.

The meeting rose at 6 p.m.